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**IN THE
COURT OF APPEALS OF INDIANA**

WARREN DUGAN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 52A04-0607-CR-377

APPEAL FROM THE MIAMI CIRCUIT COURT

The Honorable Rosemary Higgins Burke, Judge

Cause No. 52C01-9906-CF-78

December 4, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Warren Dugan (Dugan), appeals the trial court's denial of his petition to file a belated notice of appeal.

We reverse.

ISSUE

Dugan raises one issue on appeal, which we restate as: Whether the trial court abused its discretion by denying Dugan's belated notice of appeal.

FACTS AND PROCEDURAL HISTORY

On October 7, 1999, Dugan pled guilty to two counts of burglary, as Class B felonies, Ind. Code § 35-43-2-1, and one count of theft, as a Class D felony, I.C. § 35-43-4-2(a), leaving sentencing to the discretion of the trial court. On November 4, 1999, Dugan was sentenced to twenty years with five years suspended on each of the burglary counts and three years on the theft counts, all sentences to run concurrent.¹

On February 18, 2000, Dugan filed a *pro se* motion for modification of his sentence and possible alternative placement, which was denied by the trial court on January 10, 2001. While waiting for the trial court's ruling, on December 15, 2000, Dugan filed a *pro se* petition for post-conviction relief. The trial court ordered the Indiana Public Defender's Office to assist Dugan and as a result on April 9, 2001, the Indiana Public Defender's Office filed a Notice of Present Inability to Investigate and

¹ While not reflected in the Chronological Case Summary, we note that Count IV, theft, was dismissed by the State at the guilty plea hearing. (*See* Transcript p. 151-52). However, at the sentencing hearing Dugan was sentenced on all four Counts.

Amend Petitioner's *Pro Se* Petition for Post-Conviction Relief and Request to Defer Ruling Until Certificate of Readiness Filed. The trial court granted the motion.

On March 11, 2005 and May 6, 2005, Dugan's appointed counsel filed a Motion to Dismiss Petition for Post-Conviction Relief Without Prejudice and Petition for Appointment of Counsel at County Expense to Pursue Proceedings Under Ind. Post-Conviction Rule 2 and a Motion to Reconsider, respectively. The trial court denied both motions. On January 4, 2006, Dugan's appointed counsel filed a Motion to Vacate Order Dismissing Petition for Post-Conviction Relief and to Reinstate Petition. The trial court subsequently denied that Motion. On March 13, 2006, Dugan's appointed counsel filed a Motion for Permission to File a Belated Direct Appeal and a Motion to Withdraw Petition for Post-Conviction Relief Without Prejudice. On June 14, 2006, the trial court denied Dugan's Motion for Permission to File a Belated Direct Appeal and granted his Motion to Withdraw Petition for Post-Conviction Relief Without Prejudice.

Dugan now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Dugan contends he was entitled to file a belated direct appeal. Specifically, he claims he was not informed of his right to appeal his sentence; as such, the failure to file a timely notice of appeal was not his fault, and he was diligent in requesting permission to file a belated notice of appeal.

Indiana Appellate Rule 7(A) clearly states, "[a] defendant in a [c]riminal [a]ppeal may appeal the defendant's sentence." Nevertheless, a person who pleads guilty is only allowed to appeal the merits of a trial court's sentencing decision on direct appeal when,

for example, the sentence was not fixed by the plea agreement. *Collins v. State*, 817 N.E.2d 230, 233 (Ind. 2004). *Collins* also states, if the time for filing a direct appeal has run, the individual who pled guilty must file an appeal under Indiana Post-Conviction Rule 2. *Id.* Ind. P-C. R. 2 provides in pertinent part:

Where an eligible defendant convicted after...a plea of guilty fails to file a timely notice to appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

While there are no set standards defining delay or diligence, the following factors have influenced such a determination: the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay. *See Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Whether a defendant is responsible for the delay is a matter within the trial court's discretion. *Cruite v. State*, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006). When the trial court holds a hearing, we defer to their discretion as trial courts are in a better position to weigh the evidence and judge witness credibility. *Id.* However, when the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only basis for its decision is the paper record attached to the petition. *Id.* Hence, we are reviewing the same decision that was available to the trial court and owe no deference to its findings. *Id.*

In *Cruite*, the defendant plead guilty to an open plea, which left sentencing to the discretion of the trial court. *Cruite*, 853 N.E.2d at 490. The trial court did not inform him of his right to appeal the sentence that was imposed at either the guilty plea or sentencing hearing. *Id.* Six years after the trial court imposed his sentence, Cruite filed a belated appeal, which was denied. *Id.* Quoting our supreme court's decision in *Collins*, "a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised its discretion." *Collins*, 817 N.E.2d at 232. We have since held that a defendant's failure to file timely when the trial court did not separately advise him of his appellate rights to directly appeal his sentence does not preclude a belated appeal. *See Cruite v. State*, 853 N.E.2d 487 (Ind. Ct. App. 2006); *see also Perry v. State*, 845 N.E. 2d 1093 (Ind. Ct. App. 2006); *Hull v. State*, 839 N.E.2d 1250 (Ind. Ct. App. 2005).

In the instant case, at Dugan's guilty plea hearing, the trial court did not inform him of his right to appeal the sentence imposed by the trial court. Rather, the trial court explained Dugan's rights, and the rights he was foregoing, as follows:

You have the right to be represented by a lawyer during all critical stages of these proceedings, that includes the right to be represented by a lawyer at trial. If you are convicted at trial you have the right to appeal your conviction to the Indiana court of appeals and to be represented by a lawyer for that appeal. Because you are pleading guilty you give up the right to a direct appeal in this case to the Indiana court of appeals.

(Appellant's App. p. 155). As Dugan clearly was not advised of his right to appeal his sentence, we conclude that Dugan's failure to file a timely notice of direct appeal was not his fault.

Additionally, Dugan contends he was diligent in requesting permission to file a belated notice appeal. We agree. The trial court imposed his sentence on November 4, 1999. He filed a *pro se* petition for post-conviction relief on December 15, 2000. On April 9, 2001, the Indiana Public Defender's Office filed a Notice of Present Inability to Investigate and Amend Petitioner's Pro Se Petition for Post-Conviction Relief and Request to Defer Ruling Until Certificate of Readiness Filed. Then, in March 2005, after the supreme court decided *Collins* clarifying that when a defendant pleads guilty in an open plea agreement, he must challenge any sentence imposed on direct appeal, Dugan's appointed counsel filed a Motion to Dismiss Dugan's post-conviction relief petition without prejudice and a Petition for Appointment of Counsel at County Expense to Pursue Proceedings Under Ind. Post-Conviction Rule 2.² *See Collins*, 817 N.E.2d at 233. The trial court initially denied that motion, but granted it in June of 2006 at the same time it also denied Dugan's Motion for Permission to File a Belated Direct Appeal. Therefore, we find that Dugan was diligent in requesting permission to file a belated notice of appeal.

CONCLUSION

Based on the foregoing, we conclude the trial court abused its discretion by denying Dugan's belated notice of appeal.

Reversed.

BAILEY, J., and MAY, J., concur.

² We note that time spent by the State Public Defender investigating a claim does not count against a defendant when determining the issue of diligence under P-C. R. 2. *See Kling v. State*, 837 N.E.2d 502, 508 (Ind. 2005); *see also Cruite*, 853 N.E.2d. at 490.